No. 93-1753

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1993

CITY OF TIMBER LAKE, A SOUTH DAKOTA MUNICIPAL CORPORATION; CITY OF ISABEL, A SOUTH DAKOTA MUNICIPAL CORPORATION; CITY OF DUPREE, A SOUTH DAKOTA MUNICIPAL CORPORATION; AMERICAN LEGION CLUB, EDWIN HODGES POST 124, OF DUPREE; MICKI HUTCHINSON, DOING BUSINESS AS MICKI'S CAFE & LOUNGE,

*Petitioners,*

v.

CHEYENNE RIVER SIOUX TRIBE; GREGG J. BOURLAND, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE; MARVIN LECOMPTE, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CHEYENNE RIVER SIOUX TRIBE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF OF AMICI CURIAE STATES OF SOUTH DAKOTA, ARIZONA, CALIFORNIA, FLORIDA, MONTANA, AND UTAH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The states of South Dakota, Arizona, California, Florida, Montana, and Utah, through their respective Attorneys General, respectfully submit a Brief Amici Curiae pursuant to S.Ct.R. 37.2 in support of the Petition for Writ of Certiorari.

## INTEREST OF AMICI CURIAE

Each state appearing as amici curiae has one or more Indian reservations within its boundaries. These reservations were created as areas in which tribes and their members would retain exclusive ownership, but various congressional enactments have opened them to nonmember ownership in varying degrees. As a result, "the population of non-Indians on reservations generally is greater than the population of all Indians, both members and nonmembers." *Duro v. Reina*, 495 U.S. 676, 695 (1990).

Litigation in this Court has established that the tribes have little, if any, inherent civil regulatory authority over nonmembers on reservation lands when those lands are not owned by the tribe or its members. *South Dakota v. Bourland*, 113 S.Ct. 2309 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); and *Montana v. United States*, 450 U.S. 544 (1981). The authority at issue here, however, springs not from inherent tribal power but, in the Court of Appeals' view, from 18 U.S.C. § 1161. This case thus presents a narrow issue of statutory construction over the meaning of the term "Indian country" as used in that provision – i.e., whether the definition of "Indian country" in 18 U.S.C.

§ 1151 or that in 18 U.S.C. §§ 1154(c) and 1156 is incorporated into § 1161. The definition in § 1154(c) excludes from "Indian country" status "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations . . . in the absence of a treaty or statute extending the Indian liquor laws thereto." Section 1156 contains the same substantive definition. No question exists that the individual and associational Petitioners do business on fee-patented lands within "non-Indian communities" and are not otherwise subject to the prohibitions in §§ 1154 and 1156.

Notwithstanding the narrow nature of the question presented, it has practical importance to the sensitive matter of regulating alcohol transport, sale, possession and use within "Indian country." The amici states have identified several locations, other than the Petitioner towns, which are likely "non-Indian communities" under §§ 1154(c) and 1156: McIntosh, South Dakota; McLaughlin, South Dakota; Mahto, South Dakota; Parshall, North Dakota; Solan, North Dakota; Selfridge, North Dakota; Warwick, North Dakota; Polson, Montana; Ronan, Montana; Wolf Point, Montana; Harrah, Washington; Toppenish, Washington; and Wapato, Washington. Moreover, under the Court of Appeals' decision, tribal regulation applies to rights-of-way through Indian reservations. As Petitioners point out, thousands of miles of local, county, state, and federal highways cross reservations and the potential disruption of commerce on those highways is significant. Because the decision below has an immediate and substantial effect within the Eighth Circuit and, in all probability, will lead to controversy

over the scope of tribal regulatory power under § 1161 outside that circuit, review is warranted.

## SUMMARY OF ARGUMENT

The Court of Appeals' decision directly conflicts with this Court's decisions in *United States v. Mazurie*, 419 U.S. 544 (1975) and *Rice v. Rehner*, 463 U.S. 713 (1983). The latter decisions interpret the principal "Indian country" liquor statutes, 18 U.S.C. §§ 1154, 1156, and 1161, and establish that Congress did not intend to delegate to tribes regulatory jurisdiction over nonmembers either on fee-patented lands within "non-Indian communities" or on "rights-of-way" running through reservations even if otherwise part of "Indian country" as defined in 18 U.S.C. § 1151.

*Mazurie* and *Rice* drew their results from and are consistent with relevant legislative history. This history indicates that, in 1949, the definition of "Indian country" appearing in § 1151 was narrowed for liquor law regulation purposes to exclude "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations" from § 1151. *See* 18 U.S.C. §§ 1154(c), 1156. Four years later, 18 U.S.C. § 1161 was enacted. Designed to remove what had come to be regarded as discriminatory treatment toward Indians with respect to liquor transactions, § 1161 provided that federal liquor law prohibitions ordinarily applicable to "Indian country" would not extend to transactions made in conformity with state and tribal law. Because § 1161 was intended to allow

states and tribes the discretion to permit that which federal law otherwise prohibits, it makes no sense to conclude, as the Court of Appeals has, that the term "Indian country" used in that section was intended to have a geographical scope other than the one specified in §§ 1154(c) and 1156 – the statutes whose prohibitions the states and tribes were authorized to negate. Simply put, there was no need to extend to tribes the authority to remove a federal prohibition which did not exist.

## ARGUMENT

### THE COURT OF APPEALS' MISCONSTRUCTION OF THE TERM "INDIAN COUNTRY" IN 18 U.S.C. § 1161 IS GROUNDED IN A CLEARLY ERRONEOUS READING OF THIS COURT'S DECISION IN *RICE V. REHNER* AND WARRANTS REVIEW.

The Court of Appeals relied largely on footnote 1 in *Rice v. Rehner*, 463 U.S. 713 (1983), for the conclusion that the term "Indian country" in 18 U.S.C. § 1161 refers to the definition given such term in 18 U.S.C. § 1151. *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557-558 (8th Cir. 1993). The relevant portion of *Rice*, 463 U.S. at 715 & n.1 reads:

> The question presented by this case is whether the State of California may require a federally licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption. Because we find that Congress has delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian

country,[1] we reverse the judgment of the Court of Appeals for the Ninth Circuit.

---

[1] Title 18 U.S.C. § 1151 defines "Indian country" as "(a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

When viewed with the remainder of the opinion and with the only other application of § 1161 by the Court, *United States v. Mazurie*, 419 U.S. 544 (1975), this brief introductory statement does not bear the weight placed upon it by the Court of Appeals. Both *Mazurie* and *Rice* instead counsel a contrary conclusion.

*Mazurie* arose from a criminal prosecution under 18 U.S.C. § 1154 of a non-Indian couple for selling liquor at their reservation-located bar. The resident tribes had adopted an ordinance permitting such sales upon appropriate licensure, but the non-Indians had been denied a tribal license. The threshold issue was whether the bar, although within the reservation's boundaries, was situated in "Indian country" as defined in 18 U.S.C. § 1154(c). *Mazurie*, 419 U.S. at 551-52. That issue turned on whether the bar was within a "non-Indian communit[y]," *Mazurie*, 419 U.S. at 549, and this Court agreed with the implicit factual determination that the area involved "did not

comprise a non-Indian community." *Mazurie*, 419 U.S. at 552. The Court accordingly held that the non-Indians were subject to the tribal ordinance:

> Given the nature of the [bars] location and surrounding population, the statute was sufficient to advise the [non-Indians] that their bar was not *excepted* from tribal regulation by virtue of being located in a non-Indian community.

*Mazurie*, 419 U.S. at 554 (emphasis supplied). The negative corollary to the Court's holding is that the tribe would have lacked the regulatory power later found delegated under § 1161 had the bar been in a "non-Indian communit[y]." Indeed the United States, as petitioner, stressed in its merits brief that the term "Indian country" in § 1161 referred to the modified definition in § 1154(c). Brief for the United States at 7, n.6 ("[t]he exclusion of rights-of-way from the definition allows liquor to be transported through reservations without tribal regulation") & 23 ("[t]he rights of non-Indians within Indian country are protected by 18 U.S.C. § 1154(c), which exempts rights-of-way, and fee patented lands within non-Indian communities, from the liquor prohibition, even though these exemptions may be contrary to the Tribes' wishes"), *United States v. Mazurie*, 419 U.S. 544 (1975) (No. 73-1018).

That tribal regulatory power under § 1161 is geographically coterminous with the scope of the liquor transaction-prohibitions in §§ 1154 and 1156 was made even more apparent in *Rice*. There, the complainant was a tribal member who owned and operated a general store on her reservation. Upon refusal of an application to sell alcohol without a state license, she sought declaratory

and injunctive relief against state officials. Unlike the bar in *Mazurie*, no question existed that the store was located in "Indian country" as defined under §§ 1154(c) and 1156. *See* Respondent's Brief on the Merits at 52 n.9, *Rice v. Rehner*, 463 U.S. 713 (1983) (No. 82-401). This Court's quite general reference to the § 1151 "Indian country" definition footnote 1 was thus understandable since, if within "Indian country" as defined under §§ 1154(c) and 1156, the store was within "Indian country" as defined in § 1151.

What *was* at issue in *Rice* was whether § 1161 delegated federal authority to the States to regulate liquor sales in "Indian country," as that term is used in such provision, by a member of the involved reservation's governing tribe. In finding the requisite congressional authorization, the Court examined § 1161's legislative history at some length. Its review indicated that, "by 1953, federal law curtailing liquor traffic with the Indians came to be 'viewed as discriminatory.' " *Rice*, 463 U.S. at 726. To address the discrimination, Congress settled upon an approach under which the federal prohibition against "Indian country" liquor transactions could be lifted "as long as those transactions conformed both with tribal ordinances and state law." *Rice*, 463 U.S. at 728. Thus, "[b]y enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to *fill the void* that would be created by the absence of the discriminatory federal prohibition." *Rice*, 463 U.S. at 733 (emphasis supplied). Because the discriminatory federal legislation was contained in, most importantly, §§ 1154 and 1156, there is no basis to believe Congress meant the term "Indian country," as used in

§ 1161, to have a geographical scope independent of, or different from, its reach under §§ 1154(c) and 1156 – the statutes to whose discriminatory impact § 1161 was directed.

As in *Rice*, the distinction between "Indian country" under § 1151 and "Indian country" under §§ 1154(c) and 1156 sometimes will have no practical effect with respect to the propriety of a particular liquor transaction. In the Petitioner towns and similarly situated communities throughout the western United States, and on federal, state and local roads through Indian reservations, however, the difference is critical in determining the scope of tribal authority delegated under § 1161. The Court of Appeals clearly has departed from the path marked out in *Mazurie* and *Rice* concerning the meaning of "Indian country" in § 1161, and its decision warrants review to avoid further litigation.

## CONCLUSION

The amici states respectfully request the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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(4)

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*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

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## REPLY BRIEF

## ARGUMENT

### I. Respondents and the Court of Appeals have Misconstrued 18 U.S.C. §1161.

The essence[1] of Respondents' argument, *see* Brief in Opposition, p. 14, and of the rationale of the Court of Appeals, *City of Timber Lake vs. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557-558 (8th Cir. 1993), is that footnote 1 in *Rice vs. Rehner*, 463 U.S. 713 (1983), establishes that the term "Indian country" in 18 U.S.C. §1161 refers to the all-inclusive definition given that term in 18 U.S.C. §1151. Neither *Rice* nor *United States vs. Mazurie*, 419 U.S. 544 (1975), however, sustain this contention; rather, *Mazurie* and *Rice* both clearly establish that "Indian country," as used in §1161, is limited by the "Indian country" definition contained in 18 U.S.C. §§1154(c) and 1156.[2] Thus, Congress has not "clearly delegated" to Indian tribes regulatory authority over liquor sales in "non-Indian communities."

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[1] Respondents also make other arguments irrelevant to the straightforward legal question presented for review here. For example, Respondents question whether Petitioners are "non-Indians." Petitioners are clearly *not* members of the Tribe. Respondents did not question below whether Petitioners are "non-Indians," and that argument therefore has been waived. *E.E.O.C. vs. Federal Labor Relations Authority*, 476 U.S. 19 (1986).

[2] Respondents attempt to imply that Petitioners have not maintained this argument throughout this litigation, *see* Brief in Opposition at p. 14, n. 15, but the opinion of the Court of Appeals clearly reveals that the argument was raised and considered below. *See, e.g., City of Timber Lake, A-6, A-7.*

In *Mazurie*, this Court indicated that the term "Inidan country", was, in 1949, given a "narrower meaning insofar as relevant to the liquor prohibition, so as to exclude both fee-patented lands within 'non-Indian communities'[3] and rights-of-way through reservations." 419 U.S. at 547. The Court later in the same paragraph states that, in 1953, "Congress passed local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated." 419 U.S. at 547. This Court's strong indication, therefore, is that the term "Indian country" was modified in 1949 and that the modification was applicable just four years later in 1953 through 18 U.S.C. §1161.

*Rice* affirmed *Mazurie's* "understanding" of §1161, *Rice*, 463 U.S. at 729. Both the majority, *Rice*, 463 U.S. at 732, n. 15, and the dissent, *Rice*, 463 U.S. at 741, cite to the very page at which *Mazurie* discusses the evolution of the "Indian country" definition to *exclude* both fee-patented

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[3] Respondents strive to cloud the real legal issue by attempting to create a factual question where none exists. The Court of Appeals did not deem it necessary to consider whether Petitioners are operating in "non-Indian communities," instead assuming that fact for purposes of its decision. Also, Respondents have *stipulated*, for purposes of the preliminary injunction, that at least three of the Petitioners *are* located in "non-Indian communities." See Appellants' Reply Brief, *City of Timber Lake vs. Cheyenne River Sioux Tribe*, No. 93-1148 SDRC at 1-2 (8th Cir. Feb. 26, 1993) ("[Petitioners] correctly note that for purposes of the preliminary injunction only, [Respondents] stipulated that Isabel and Timber Lake are non-Indian communities, contending that this is irrelevant.")

lands within non-Indian communities and rights of way through reservations. *See Mazurie,* 419 U.S. at 547.

Respondents attempt to avoid the import of *Rice* and *Mazurie* by citing the dual purpose of 18 U.S.C. §1161 to end federal prohibitions on the introduction and sale of liquor and the delegation of the authority to Indian tribes to regulate the sale of alcoholic beverages. *See* Brief in Opposition at 16. But what is at stake here is the definition of "Indian country" used in 18 U.S.C. §1161.

The Court in both *Mazurie* and *Rice* has indicated that the term "Indian country" for the purpose of §1161 was limited by 18 U.S.C. §1154(c) to exclude fee lands in non-Indian communities. The Court of Appeals erred in finding to the contrary and Respondents err in making the same argument here.[4]

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[4] Although Respondents attempt to rely upon the actions of the Secretary in approving Tribal Ordinance 48, *see* Brief in Opposition, pp. 8-9, n. 8, they fail to undermine the prior inconsistent arguments of the United States made by the Solicitor General to the Court in *Mazurie*. *See* Petition at 12 and n. 11.

## II. Pursuant to *Rice vs. Rehner*, the Tribe has no inherent authority[5] based upon the *Montana* exceptions to regulate liquor establishments.

This Court expressly stated in *Rice vs. Rehner*, 463 U.S. 713, 724 (1983), that "[t]here can be no doubt that Congress has divested the Indians of *any* inherent power to regulate [the liquor trade]." (Emphasis added). Thus, the majority of the Tribe's response deals with factual allegations that are wholly irrelevant to the legal question presented here – whether Congress has expressly delegated authority to Indian tribes to regulate liquor traffic in "non-Indian communities."

Petitioners acknowledge that widespread problems of alcohol abuse exist on numerous reservations, but Petitioners specifically deny making any significant contribution to those problems on the Cheyenne River Indian

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[5] Respondents mistakenly claim that Petitioners have "dropped their attack" on the tribal business license ordinance. In its decision, the Court of Appeals concluded that the delegation of authority it found was broad enough to support both the liquor and business license requirements, and it made no ruling whatsoever on Petitioners'-*Brendale*-based attacks on the business license ordinance. Accordingly, the delegation question presented here, *see* Question Presented, explicitly carries with it a request for review of the enforceability of the business license on the rationale adopted by the Court of Appeals. Upon remand, Petitioners intend to continue with their claim that the business license ordinance is unenforceable as against Petitioners.

Similarly, Petitioners have not waived any claims nor lost standing by applying for tribal liquor and business licenses. Respondents omit the fact that the licenses were applied for "under protest," and that the accompanying transmittals specifically reserved the Petitioners' claims.

Reservation. There are no supportable factual findings by any court that Petitioners' establishments contribute in any significant way to liquor-related problems on the Cheyenne River Reservation. In fact, the *Tribe* has licensed numerous liquor establishments in Eagle Butte, a predominantly "Indian" community and the seat of tribal government. The generalized[6] factual findings of the tribal trial court concerning the Petitioners' specific establishments do not support the Tribe's arguments.

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[6] For example, the tribal trial court found that "15%-85%" of the clientele of the defendants in the tribal court case were Indians. A-78. The tribal trial court was not specific about which establishment had 15%, and which had 85%. In fact, two of the defendants in the tribal court case are not petitioners in this case. A-28.

The two "examples" of testimony allegedly tying Petitioners' establishments to reservation liquor problems are the *only two* instances in the tribal trial transcript where there was a specific relationship identified. For example, the testimony presented was that most persons treated at the IHS Hospital that were diagnosed with alcoholism were from Eagle Butte, a clearly "Indian" community. The police chief testified that his arrest statistics were not broken out by community, and that he had "no idea" where violators purchased their alcohol. *See* Appellees'/Cross-Appellants' Brief, *City of Timber Lake vs. Cheyenne River Sioux Tribe*, No. 93-1148 SDRC at p. 3, n. 2 (8th Cir., Feb. 16, 1993).

Of the two "examples" cited by the Tribe, only one was testimony by a live witness. The other was a transcript of the testimony of the defendant at his own criminal trial, hardly competent or persuasive. Petitioners deny the unsupported allegation concerning their connection to the death of a tribal member pending the appeal.

## III. Petitioners have not previously waived any arguments presented to this Court.

The argument made by Petitioners concerning rights-of-way was not waived. Petitioners have never claimed that they are liquor transporters, although it is clear that the Tribe does claim the right to regulate liquor transport on rights-of-way through the reservation. A-112. The argument is intended to show that Congress clearly could not have had the intent attributed to it by the Court of Appeals.

Petitioners do not contend, as Respondents seem to assert, *see* Brief in Opposition at 16-17, that §1161 did not delegate *any* power to tribes. Rather, Petitioners' argument is simply that Congress did not delegate to the tribes any authority over fee lands in non-Indian communities or on rights-of-way. Petition at 11.

Respondents also claim that one of the related supporting arguments, i.e., that the Court of Appeals erred when it found a delegation of authority that allows the Tribe to enforce liquor regulations in the Tribes' *own* courts,[7] is not before this Court because it was not raised

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[7] The statements at oral argument before the Court of Appeals' panel cited by Respondents, Brief in Opposition at 23, are taken out of context. Those statements related to an argument made by Petitioners that the Court of Appeals should affirm the district court decision because the decision of the tribal court was based upon an error of federal law. Transcript of Oral Argument at 19-20. It is also important to note that the quote in Respondents' Brief is paraphrased from statements seven transcripts pages apart. *See* Brief in Opposition at 23.

below. Brief in Opposition at 23; Petition at 15. This argument, however, merely indicates a further mistaken analysis of *Mazurie* and §1161 by the Court of Appeals. Thus, it is properly raised here to question the persuasiveness and legal authority of the decision below.[8]

## IV. The only logical construction of §1161 that gives operative effect to every word of the statute is that proposed by Petitioners.

Sections 1154 and 1156 were in place before §1161 was adopted. Section 1161 makes specific reference to §§1154 and 1156, and §1161 is meaningless without those references. Section 1161 does not refer only to certain subsections or sentences of §1154 and 1156; rather, §1151 refers to §§1154 and 1156 in their entirety, including the exceptions for "non-Indian communities" and "rights-of-way."[9]

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[8] Respondents' objections to the refinement of Petitioners' arguments are not, in any case, well taken. *See Bellotti vs. Baird*, 428 U.S. 132, 143, n. 10 (1976) ("Fact that full arguments . . . may not have been asserted . . . does not bar this Court's consideration of the issue.") Petitioners are not raising new defenses or requesting new or different relief.

[9] The argument contained in Footnote 21 of Respondents' brief is disingenuous. Section 1154(a) includes a prohibition on the sale of liquor to Indians *anywhere* in the United States. Section 1161 repealed that prohibition ("Section 1154 . . . shall not apply within any area that is not Indian country . . . "). Section 1161 also *independently* gave to the tribes the authority to repeal prohibition on-reservation (in areas other than non-Indian communities and rights-of-way). The Cheyenne River Sioux Tribe promptly did so in 1953, but didn't assert any jurisdiction over non-trust lands, thus effectively disclaiming